No. 75-808

# In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY M. NATELLI, PETITIONER
*v.*
UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS





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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 527 F. 2d 311.[1]

### JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on July 28, 1975. A petition for rehearing was denied on November 5, 1975 (Pet. App. D). The petition for a writ of certiorari was filed on December 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] In its original opinion affirming petitioner's conviction, the court of appeals reversed the conviction of petitioner's co-defend-

(Continued)

## QUESTIONS PRESENTED

1. Whether, in a prosecution of a certified public accountant for willfully and knowingly making false statements in audited and unaudited financial statements, the district court was required, notwithstanding evidence of extraordinarily suspicious circumstances surrounding the unaudited financial statement, to instruct the jury on what the accountant's normal professional obligation would be with respect to unaudited statements in the absence of such suspicious circumstances.

2. Whether the district court correctly instructed the jury that, if it found that petitioner "deliberately closed his eyes to the obvious" or acted with "reckless deliberate indifference to or disregard for truth or falsity," it could infer that petitioner acted willfully and knowingly.

3. Whether the district court's instructions adequately informed the jury that its verdict must be unanimous.

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ant, Joseph Scansaroli, and remanded his case for a new trial (Pet. App. 30a). The court thereafter granted the government's petition for rehearing and affirmed the conviction of Scansaroli (Pet. App. C). Subsequently, on Scansaroli's petition for rehearing, the panel withdrew its opinion on the government's petition for rehearing and reinstated its original opinion and judgment reversing Scansaroli's conviction. See the appendix to petitioner's supplemental brief. The government has filed a further petition for rehearing and suggestion for rehearing *en banc*, which is presently pending before the Second Circuit.



4. Whether the district court correctly denied a motion to dismiss the indictment on the ground of improper venue.

5. Whether the prosecutors withheld material evidence from and made affirmative misstatements to the jury.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of willfully and knowingly making and causing to be made false and misleading statements with respect to material facts in a proxy statement required to be filed with the Securities and Exchange Commission, in violation of Section 32(a) of the Securities Exchange Act of 1934, 48 Stat. 904, as amended, 15 U.S.C. 78ff(a).[2] Petitioner was sentenced to serve 60 days of a one year term of imprisonment, the balance to be served on probation, and he

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[2] 15 U.S.C. 78ff(a) provides in part:

"Any person who * * * willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both * * *."

was fined $10,000 (Pet. App. 3a). The court of appeals affirmed (Pet. App. A).[3]

Petitioner, a certified public accountant and a partner in the accounting firm of Peat, Marwick, Mitchell & Company ("Peat"), was the engagement partner for Peat's audits of the financial statements of National Student Marketing Corporation ("NSMC"). The indictment charged that petitioner participated with others in willfully and knowingly making two false statements of material facts in a proxy statement filed by NSMC with the Securities and Exchange Commission in connection with a special meeting of NSMC stockholders, held in the fall of 1969 to consider issuing additional shares of common stock and approving proposed mergers with other companies.

First, the proxy statement contained an audited statement of earnings for NSMC's fiscal year 1968. Some of the figures in the statement differed from those in a previous statement of earnings for the same year (also audited by petitioner) that had been contained in the company's annual report to its stockholders. The indictment alleged that a footnote purporting to explain those differences was materially false and misleading because, as petitioner knew, it substantially overstated NSMC's net sales and profits for the period. Second, the proxy statement also contained an unaudited statement of NSMC's earnings for the first nine months of fiscal year 1969. The indictment alleged that figures in that statement, purporting to reflect net sales and net earnings, were materially false and misleading because, as petitioner knew, they substantially overstated each.

[3] Petitioner's co-defendant at trial, Joseph Scansaroli, was also convicted of the same offense, but his conviction was ultimately reversed by the court of appeals (see note 1, *supra*). Four other defendants who were charged in the same indictment—Cortes W. Randell, Bernard J. Kurek, Dennis M. Kelly, and Robert C. Bushnell—pleaded guilty to one or more counts prior to the commencement of petitioner's trial. Another defendant, John G. Davies, was severed and subsequently pleaded guilty to one count of a superseding indictment.



1. *The Footnote.* The evidence at trial, as summarized in the opinion of the court of appeals (Pet. App. 3a–12a), showed that, in his initial audit of NSMC's 1968 financial statements, petitioner certified, without adequate verification, the post-fiscal-year booking of approximately $1.7 million of unbilled NSMC sales on the basis of what were represented to be oral commitments to use NSMC marketing services. As a result, the company's audited statements, contained in the 1968 annual report, reflected a substantial profit instead of a loss. After the 1968 annual report was published and before the proxy statement at issue here was filed, "seven companies were acquired largely in exchange for [NSMC] stock, in reliance on the 1968 annual report" (Pet. App. 7a).

In the first six months following publication of the 1968 annual report, NSMC wrote off as "uncollectible" more than $1 million of the $1.7 million of unbilled sales that petitioner had allowed to be booked.

By an unorthodox procedure approved by petitioner, a large portion of the earnings attributable to the write-off (an ordinary item) was "netted" with an unrelated tax credit (an extraordinary item), and the tax credit was rounded off to make it identical to the write-off. As the court of appeals stated, "[t]he effect of the netting procedure was to bury the retroactive adjustment which should have shown a material decrease in earnings for the fiscal year ended August 31, 1968" (Pet. App. 8a–9a).

The audited statement of earnings for 1968 that appeared in the 1969 proxy statement reflected the combined operations of NSMC and the later-acquired (or "pooled") companies. An explanatory footnote was drafted to compare NSMC's separate sales and earnings for 1968, as originally reported in the 1968 annual report, with the consolidated figures for the same period, as reflected in the proxy statement.[4] As

[4] The footnote stated in relevant part (Pet. App. 4a, n. 2):

"Net sales and earnings as originally reported to stockholders in the annual report [for the year 1968] and the amounts as shown in the statement of earnings in this proxy statement are reconciled as follows:

| | 1968 |
|---|---|
| "*Net sales:* | |
| Originally reported | $4,989,446 |
| Pooled companies reflected retroactively | 6,552,449 |
| Per statement of earnings | $11,541,895 |
| "*Net earnings:* | |
| Originally reported | $388,031 |
| Pooled companies reflected retroactively | 385,121 |
| Per statement of earnings | $773,152" |



the court of appeals stated, "[t]he footnote was the only place in the proxy statement which would have permitted an interested investor to see what [NSMC's] performance had been in its preceding fiscal year 1968, as retroactively adjusted, separate from the earnings and sales of the companies it had acquired in fiscal year 1969" (Pet. App. 9a).

Although most of the unbilled sales that had been booked for fiscal year 1968 had been written off by the time the proxy statement was prepared, that write-off was not reflected in NSMC's "net sales" figures shown in the footnote. Instead, at petitioner's direction, the amount of the write-off was improperly subtracted from the figure showing the net sales of the *acquired* companies. The footnote also did not reflect the reduction in NSMC's net earnings occasioned by the sales write-off.[5] An original draft of the footnote contained a partial narrative disclosure of certain contract losses, but that narrative disclosure was stricken by petitioner (Pet. App. 9a–10a).

2. *The Pontiac and Eastern "commitments."* The proxy statement also included unaudited financial statements for the first nine months of NSMC's fiscal year 1969. The statements as prepared by NSMC reflected an unbilled sale to the Pontiac Division of Gen-

[5] A large portion of the write-off had been "netted" with an extraordinary tax credit (see p. 6, *supra*). An additional reduction of $21,000 in NSMC's net earnings for 1968, attributable to other sales write-offs, was subtracted by petitioner from the figure showing the net earnings of the acquired companies rather than from the figure showing NSMC's net earnings (Govt. Exhs. 17 and 65–12).

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eral Motors in the amount of $1.2 million. Petitioner had indicated that he might not permit the Pontiac sale to remain on the books unless additional information were provided to show that there was a firm commitment (Tr. 653, 672; Natelli Exh. H).[6]

Petitioner, other Peat employees, and NSMC officials gathered in New York on the night of August 14, 1969, at the Pandick Press, which was to print the proxy statement the next day. At about 3:00 A.M. on August 15, petitioner told NSMC's president, Cortes Randell, that the Pontiac sale could not be included in the nine-month earnings statement. Randell responded that NSMC had an unbooked but firm commitment from Eastern Airlines in a comparable amount attributable to the same nine-month period (which had ended more than two months earlier). An NSMC salesman arrived at the printing plant several hours later with a letter from Eastern Airlines dated August 14, 1969, purporting to confirm an $820,000 oral commitment ostensibly made on May 14, 1969, two weeks before the end of the nine-month period (Pet. App. 10a–11a). The court of appeals stated (Pet. App. 15a–16a; footnote omitted):

> The Eastern contract was a matter for deep suspicion because it was substituted so rapidly

[6] The Pontiac sale had been booked as of February 28, 1969, the close of the first six months of NSMC's fiscal year 1969, although the letter purporting to evidence the sale was dated April 28, 1969, two months after the close of that period, and stated only that Pontiac was then "planning to implement * * * [NSMC] proposals that would result in gross billings of $1,200,000" (Govt. Exh. 12). The booking of the Pontiac sale occurred at approximately the same time as the write-off of $1 million of 1968 sales (see pp. 5–6, *supra*).



> for the Pontiac contract to which Natelli had objected, and which had, itself, been produced after the end of the fiscal period, though dated earlier. It was still another unbilled commitment produced by [NSMC] long after the close of the fiscal period. Its spectacular appearance, as Natelli himself noted at the time, made its replacement of the Pontiac contract "weird." The Eastern "commitment" was not only in substitution for the challenged Pontiac "commitment" but strangely close enough in amount to leave the projected earnings figures for the proxy statement relatively intact. [NSMC] had only time logs of a salesman relating to the making of the proposals but no record of expenditures on the Eastern "commitment," no record of having ever billed Eastern for services on this "sale," and not one scrap of paper from Eastern other than the suddenly-produced letter.

Petitioner ultimately concluded that the purported Eastern commitment should be booked. "When the proxy statement was printed in final form, the Pontiac 'sale' had been deleted [from the nine-months' earnings statement], but the Eastern 'commitment' had been inserted in its place" (Pet. App. 11a).

The day after the incident at Pandick Press, a Peat accountant working under petitioner's overall supervision discovered more than $177,000 worth of additional "bad" contracts that had been booked as unbilled receivables in fiscal year 1968 and that had not yet been written off. The accountant suggested to

NSMC's comptroller that these and other "questionable" contracts, together totaling about $320,000, be written off and that appropriate adjustments be made in the financial statements contained in the proxy statement (Tr. 745–760). The comptroller consulted with co-defendant Scansaroli (another Peat accountant working directly under petitioner); after consulting with petitioner, Scansaroli decided against the suggested write-offs and adjustments (Pet. App. 11a).

The proxy statement, as filed with the Securities and Exchange Commission on September 30, 1969, reflected, for the nine-month period ending May 31, 1969, consolidated net earnings of approximately $700,000 (Govt. Exh. 25, p. 21). As the court of appeals stated, "[a] true disclosure, which was not made, would have shown that without these unbilled receivables [NSMC] had no profit in the first nine months of [fiscal] 1969" (Pet. App. 11a).

**ARGUMENT**

1. Petitioner was charged with willfully and knowingly making false and misleading statements in audited and unaudited financial statements. He does not here challenge the sufficiency of the evidence to support his conviction. He contends that the district court should have instructed the jury "on the scope of an accountant's professional obligations when working with unaudited statements" (Pet. 26).

The court of appeals correctly held, however, that the instruction requested by petitioner on this point



"was not correct" and "was properly denied" by the district court (Pet. App. 24a). Petitioner does not challenge that holding, nor does he even now suggest what a proper instruction would have been. His contention is that, because the court "instruct[ed] the jury on an *auditor's* responsibility," it erred in failing "to add *any* remarks distinguishing *unaudited* statements" (Pet. 28, n. 17; emphasis in original). The contention rests on an inaccurate premise.

The district court instructed the jury that it could, in determining whether petitioner acted willfully and knowingly, consider whether he "followed or deviated from generally accepted auditing or accounting standards" (Tr. 2365). Rather than undertaking to formulate the governing standards, however, the court properly deferred to the jury's assessment of the "expert opinion evidence offered by various witnesses" (Tr. 2366). The few general references to the professional duties of an accountant were, for the most part, broadly applicable to unaudited as well as audited statements and did not outline in any detail the procedures generally followed in an audit.[7] The court's occasional

[7] The court stated that "a firm of public accountants, * * * engaged to perform an independent audit for a corporation such as NSMC, represents and warrants that it will perform the audit and other accounting work in accordance with generally accepted auditing and accounting principles, that it will render an opinion based upon its audit, for example, as to whether the financial statement of the company fairly presents its financial position and the results of its business operation" (Tr. 2367). The court also included the following remarks in its instructions: "[N]o one is contending, and it certainly is not the fact, that an outside auditing

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use of the word "auditor" in place of "accountant," to which no objection was made, does not support petitioner's assertion that the instructions "focused exclusively on auditing" (Pet. 28).

In any event, as the court of appeals correctly stated, the issue "is not what an auditor is *generally* under a duty to do with respect to an unaudited statement, but what these defendants had a duty to do in these unusual and highly suspicious circumstances" (Pet. App. 23a; emphasis in original). The court described that duty as follows (Pet. App. 16a–17a):

> It is common ground that the auditors were "associated" with the [nine-month earnings] statement and were required to object to anything they actually "knew" to be materially false. In the ordinary case involving an unaudited statement, the auditor would not be chargeable simply because he failed to discover the invalidity of booked accounts receivable, inasmuch as he had not undertaken an audit with verification. In this case, however, Natelli "knew" the history of [NSMC's] post-period bookings and the dismal consequences later discovered. Was he under a duty in these circumstances to object or to go beyond the usual scope of an accountant's review and insist upon some independent verification? The American Institute of Certified Public Accountants, Statement of Auditing Standards No. 1—Codification of Auditing Standards and Procedures (1972), 1 CCH AICPA Professional Standards § 516.00, recognizes that "if the certified public accountant concludes on the basis of facts known to him that unaudited financial statements with which he may become associated are not in conformity with generally accepted accounting principles, *which include adequate disclosure,* he should insist . . . upon appropriate revision . . ." (emphasis added).
>
> We do not think this means, in terms of professional standards, that the accountant may shut his eyes in reckless disregard of his knowledge that highly suspicious figures, known to him to be suspicious, were being included in the unaudited earnings figures with which he was "associated" in the proxy statement.

firm such as PMM has responsibility for the operations or management of a company such as NSMC. An auditor must ascertain that the financial statement in question, such as the figures or the footnote, fairly presents the results of the operations and the financial position of the company. Also, * * * an auditor must honestly believe that that financial statement or statements are neither false nor misleading in respect to material facts" (Tr. 2369).



The court of appeals correctly stated that, in the "unusual and highly suspicious circumstances" surrounding NSMC's effort to substitute the Eastern "sale" for the unacceptable Pontiac "sale," petitioner's duty "was not so different from the duty of an accountant upon an audit as to require sharply different treatment of that duty in the charge to the jury" (Pet. App. 23a). Indeed, Peat's own general outline of procedures to be followed by its accountants in reviewing certain unaudited financial statements is explicitly conditioned on the assumption that "there are no unusual circumstances that would require additional investigation to ascertain that the interim figures are not misleading" (Govt. Exh. 13, p. E101).

Contrary to petitioner's assertion, the court of appeals did not adopt "a theory of professional obligation * * * that compels accountants to ignore the distinction" between audited and unaudited financial statements (Pet. 26) or to "observe auditing procedures even when dealing with unaudited statements" (Pet. 28). As the court clearly stated (Pet. App. 24a):

> We expound no rule * * * that an accountant in reviewing an unaudited company statement is bound, without more, to seek verification and to apply auditing procedures. We lay no extra burden on the normal activities of accountants, nor do we assume the role of an Accounting Principles Board. We deal only with such deviations as fairly come within the common understanding of dishonest conduct which jurors bring into the box as applied to the particular conduct prohibited by the particular statute.

The court held only that, in the special circumstances of this case, the district court was not required to instruct the jury on "the abstract question of an accountant's responsibility for unaudited statements, for that was not the issue" (*ibid.*). Petitioner apparently recognized as much at trial, for, while he presented the testimony of six certified public accountants, not one of them testified concerning the nature of any procedural differences in an accountant's responsibility with respect to audited and unaudited financial statements.[8]

[8] In his reply brief in the court of appeals, petitioner asserted that "the defense did elicit * * * proof," from witnesses other than petitioner's own experts, that there is a "distinction between * * * outside accountants' duties with regard to audited and unaudited figures" (p. 33). But none of the testimony cited by petitioner—Tr. 305–306, 350, 792, 1534–1535—purports to describe these allegedly different duties. The general proposition, assented to by a government witness, that an accountant reviewing unaudited financial statements does not "do a complete check on the company's figures" (Tr. 306) provides no basis for the kind of instruction that petitioner contends was required. The one exhibit cited by petitioner—Govt. Exh. 13, a voluminous compilation of codefendant Scansaroli's work papers—includes Peat's two-page general outline for the review of certain unaudited financial statements. To the extent that the outline bears on the present issue, its express condition, quoted above, supports our position, not petitioner's (see p. 13, *supra*).



The issue is whether, in light of petitioner's prior experience with NSMC's post-period booking of unbilled (and ultimately uncollectible) "sales"—which in each instance resulted in the reporting of profits instead of losses—his failure to "insist upon some independent verification" (Pet. App. 16a) of the purported Eastern Airlines commitment could properly have been found by the jury to have amounted to "deliberately clos[ing] his eyes to the obvious" (Pet. App. 23a). Where, as here, the circumstances are extraordinarily suspicious, the scope of an accountant's duty in ordinary, non-suspicious circumstances is of minimal pertinence.

2. Petitioner contends that the district court erroneously permitted the jury to find him guilty of the offense charged in the indictment "without regard to his actual knowledge or belief" (Pet. 22) and that the court of appeals, in holding that "[i]t was sufficient * * * if petitioner had acted with 'reckless disregard' for the true facts" (*ibid.*), "eliminat[ed]

These instructions, while properly permitting the jury to draw common sense inferences concerning guilty knowledge from pertinent circumstantial evidence, did not on any fair reading allow the jury to find petitioner guilty "without regard to his actual knowledge or belief" (Pet. 22). The court repeatedly stated, both before and after its discussion of the inferences that could be drawn concerning guilty knowledge, that the prosecution was required to prove beyond a reasonable doubt that petitioner acted willfully and knowingly.

Petitioner concedes that "the making of an erroneous statement in ignorance of the facts can be held criminal [under 15 U.S.C. 78ff(a)] * * * if the defendant has consciously closed his eyes to the truth" (Pet. 30). He argues that the district court should have told the jury *sua sponte* that, to infer guilty knowledge, it must find that petitioner had "a conscious purpose to avoid learning the truth" (Pet. 31).[11]

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ply through carelessness or negligence, with a mistaken but nevertheless honest belief that his participation was correct, truthful and sufficient, then you should acquit that defendant" (*ibid.*).

[11] Petitioner did not request an instruction containing the language that he now argues was necessary. He objected to the government's proposed instruction concerning knowledge and willfulness (which contained a clause on recklessness) on the ground that, because there was evidence that petitioner had *considered* the matter of substituting the Eastern Airlines sale for the Pontiac sale, "this is not a case of reckless disregard" (Tr. 2139). Following the court's charge, petitioner, "just to preserve my record," objected generally "to the charge on reckless disregard" (Tr. 2383). Similarly, following the court's rereading of that portion of the instructions at the jury's request, petitioner again objected to the "inclusion of the reckless disregard language in the charge, as I did



But the language used by the district court ("deliberately closed his eyes to the obvious"; "reckless deliberate indifference to or disregard for truth or falsity") "'mean[s] essentially the same thing'" as the language suggested by petitioner (Pet. App. 22a). *United States* v. *Sarantos*, 455 F. 2d 877, 882 (C.A. 2).[12] The district court was not required to use the precise words that petitioner now proposes.

Nothing in this Court's recent decision in *Ernst & Ernst* v. *Hochfelder*, No. 74–1042, decided March 30, 1976, casts doubt on the correctness of the result here. The Court there held that a private cause of action for damages will not lie under Section 10(b) of the Securities Exchange Act and SEC Rule 10b–5 "in the absence of any allegation of 'scienter'—intent to deceive, manipulate, or defraud" (slip op. 7). The Court rejected a reading of Section 10(b) that would have imposed liability for negligent conduct alone.

The issue in *Hochfelder* could not arise under Section 32(a), because that provision, unlike Section 10(b), contains an explicit scienter requirement: the indictment must allege and the jury must find beyond a reasonable doubt that the defendant "willfully and knowingly" made a false statement of a

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at the time it was given" (Tr. 2428–2429). To the extent that petitioner is now complaining of the failure to include the "conscious purpose" language suggested in his petition, his claim must be assessed under the plain error standard of Rule 52, Fed. R. Crim. P.

[12] *United States* v. *Bright*, 517 F. 2d 584 (C.A. 2), relied on by petitioner, is not to the contrary. The jury there was instructed that the defendant's knowledge that certain checks were stolen could be inferred from a reckless disregard for whether the checks were stolen *or* from a conscious effort on the defendant's part to avoid

(Continued)

material fact. The instructions in the present case accordingly made clear that negligent or careless conduct was not a basis for conviction and that guilty knowledge and intent were an essential element of the crime.

For the same reason, this case does not present a question analogous to the one that the Court found it unnecessary to decide in *Hochfelder*—"whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b–5" (slip op. 7, n. 12)). It was the prosecution's theory throughout the trial that petitioner deliberately made the false statements with which he was charged in order to conceal NSMC's losses and his own prior errors. The district court did not instruct the jury—and the court of appeals did not hold—that "recklessness is * * * a form of intentional conduct for purposes of imposing [criminal] liability" (*ibid.*) under Section 32(a). On the contrary, the jury was instructed repeatedly that it could return a verdict of guilty only if it found beyond a reasonable doubt that petitioner acted "willfully and knowingly."

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learning the truth (517 F. 2d at 588). Contrary to petitioner's reading of the decision, the court of appeals did not reverse the conviction "because of the trial judge's failure to include the requirement of a 'conscious purpose' when instructing that a 'reckless disregard' for the truth would suffice to convict" (Pet. 32). Indeed, the court "assume[d] that the use of the disjunctive 'or' standing by itself would *not* require us to reverse" (517 F. 2d at 588; emphasis added). The reason for the reversal was that the district court failed to give a balancing instruction, specifically requested by defense counsel, that the jury should acquit if it found that the defendant actually believed that the checks were not stolen (*ibid.*). In the present case, the court of appeals, *relying* on its decision in *Bright*, correctly ruled that the district court gave "a balanced charge which made it clear that negligence or mistake would be insufficient to constitute guilty knowledge" (Pet. App. 21a).



The court permitted the jury to take into account, in its consideration of petitioner's knowledge and intent, whether he "*deliberately* closed his eyes to the obvious" or "recklessly stated as facts matters of which he *knew* he was ignorant" (Tr. 2364–2365, 2427; emphasis added), and the jury was told that it could infer guilty knowledge and intent if it found that petitioner acted with "such reckless deliberate indifference to or disregard for truth or falsity" (Tr. 2365, 2427). But those remarks did not alter the express statutory requirement that the accused be found to have acted willfully and knowingly.

In the first place, when the district court's language is "viewed in the context of the overall charge" (*Cupp* v. *Naughten*, 414 U.S. 141, 147), it is apparent that the focus was on deliberateness rather than recklessness. The jury was told, in effect, that it could properly infer guilty knowledge if it found that petitioner had shielded himself from the truth in the face of highly suspicious circumstances. That is the standard that petitioner himself embraces in substance (Pet. 24–25, 30–32).

But even viewing the phrase "reckless deliberate indifference" "in artificial isolation" (*Cupp* v. *Naughten*, *supra*, 414 U.S. at 147), and even indulging a narrower focus solely upon the word "reckless," the instructions still could not fairly be characterized as equating reckless conduct with willful and knowing conduct. It would be one thing to instruct a jury that it may return a verdict of guilty if it finds beyond a reasonable doubt that the defendant acted recklessly.

It is quite another thing to instruct the jury that it *may*, if it finds that the defendant acted recklessly, draw an inference from that finding ("depend[ing] upon the weight and credibility extended to the evidence of reckless and indifferent conduct" (Tr. 2365)) that the defendant acted willfully and knowingly, but that it may return a verdict of guilty only if it finds beyond a reasonable doubt, in light of all the evidence, that the defendant in fact acted willfully and knowingly.

In the one case, recklessness would *be* the standard of culpability. In the other case, as here, reckless conduct would be simply one of the many facts from which the jury might infer guilty knowledge and intent, but the standard of culpability would remain willful and knowing conduct.

3. The district court charged the jury that it could return a guilty verdict if it found that the proxy statement was false in either of the two respects alleged in the indictment.[13] The court also told the

[13] The court stated (Tr. 2340–2341):

"Now, I instruct you that if you find that the proxy statement was false in either one of these two respects, that is sufficient to support a conviction. Put differently the Government isn't required in order to support a conviction here to prove that both parts or both false and misleading statements, so called, of material facts were such in order to support a conviction.

"* * * [T]he issue which you really have to focus on here can be stated in a relatively simple fashion: Did the defendants or either one of them knowingly and intentionally either prepare and submit material misstatements as to the financial position or financial operations for NSMC for the year of 1968, for which the figures were stated to be audited, or in respect to the figures for NSMC for the first nine months of 1969, which were, as I recall the proxy statement, labeled as unaudited figures.



jury that its verdict with respect to each defendant must be unanimous (Tr. 2380). At the close of the instructions, petitioner asked the court to add that the jury "must be unanimous as to which statement is false" (Tr. 2384). The court responded: "I think that's clear from what I have already said and I won't say anymore about that" (*ibid.*).

Petitioner argues that "[t]he failure of the trial court to give the requested charge created a substantial risk that the requirement of unanimity was not satisfied; the jurors might have agreed that the government had proved *one* specification of the indictment beyond a reasonable doubt, but disagreed as to which" (Pet. 34). The contention was correctly answered by the court of appeals (Pet. App. 26a; footnote omitted):

> The charge given by Judge Tyler is a charge generally given in this circuit. It is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications

"If you were to determine that in neither one of the two respects alleged the statements were false or misleading, why, then, of course, you would be obliged to acquit both defendants.

"On the other hand, if you were to determine that in either or both respects the financial information or data or figures were in fact false and misleading in a material sense, then you would be obliged to consider whether or not the defendants knowingly participated in making these figures and putting them in the proxy statement to be filed with the SEC, and if you did find that they either knowingly made these misstatements or they caused them to be made or they aided and abetted in their making, then you woul be obliged to convict the defendant or defendants for which you make these findings."

> they find to be the predicate of the guilty verdict. We do not say it would be wrong for a trial judge to give the charge requested, but it is not error to refuse it. And we do not change that rule.

See also *Vitello* v. *United States,* 425 F. 2d 416, 422–423 (C.A. 9), certiorari denied, 400 U.S. 822; *United States* v. *Armone*, 363 F. 2d 385, 398 (C.A. 2), certiorari denied, 385 U.S. 957. The issue does not merit further review by this Court.

4. Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78ff(a), makes it a criminal offense willfully and knowingly to make a false statement in a document required to be filed with the Securities and Exchange Commission. Section 27 of the Act, 15 U.S.C. 78aa, provides that "[a]ny criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred." Petitioner argues that, because the proxy statement containing the false statements was filed with the Securities and Exchange Commission at its offices in Washington, D.C., "venue properly lay only in the District of Columbia" (Pet. 36) and the district court therefore erroneously denied his motion to dismiss the indictment returned in the Southern District of New York.

Petitioner does not deny, however, that the false statements contained in the proxy statement were prepared by him at least in part in the Southern District of New York (*ibid.*). It seems obvious to us, as it did to the courts below, that the preparation of a false statement to be included in a document filed with the



Securities and Exchange Commission is, within the meaning of Section 27, an "act or transaction constituting the violation" of Section 32(a). The lower federal courts have consistently held in similar cases involving the filing of false statements in violation of federal statutes that, under 18 U.S.C. 3237(a),[14] venue properly lies in the district where the false statements are prepared as well as in the district where they are filed.[15] See *United States* v. *Slutsky*, 487 F. 2d 832, 838–839 (C.A. 2), certiorari denied, 416 U.S. 937; *United States* v. *Bithoney*, 472 F. 2d 16, 21–24 (C.A. 2), certiorari denied, 412 U.S. 938; *United States* v. *Ruehrup*, 333 F. 2d 641 (C.A. 7), certiorari denied, 379 U.S. 903; *Imperial Meat Co.* v. *United States*, 316 F. 2d 435, 440 (C.A. 10), certiorari denied, 375 U.S. 820; *Henslee* v. *United States*, 262 F. 2d 750 (C.A. 5), certiorari denied, 359 U.S. 984.

*Travis* v. *United States,* 364 U.S. 631, on which petitioner relies, does not require a different result here. That case involved a prosecution under 18 U.S.C. 1001, which proscribes the making of false statements "in any matter within the jurisdiction of

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[14] That section provides in part: "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

[15] The court of appeals had no occasion to consider whether petitioner could have been tried in the District of Columbia as well as in the Southern District of New York. Petitioner made no motion for a change of venue for the convenience of the parties, pursuant to the provisions of Rule 21(b), Fed. R. Crim. P.

any department or agency of the United States." The decision turned on the interaction of that provision and a section of the National Labor Relations Act, under which the Board's "jurisdiction" did not attach until the false statements at issue—non-Communist affidavits of union officers—had been filed. Recognizing that "[t]he decisions are discrete, each looking to the nature of the crime charged," and that venue determinations depend upon "the phrasing of a particular criminal statute" (364 U.S. at 635), the Court concluded, in view of the unusual "statutory design" (*ibid.*), that Congress intended the locus of the offense, and therefore the venue for a prosecution, to be exclusively in the District of Columbia, where the Board is located.

As the court of appeals correctly held, the statutory design here is materially different from that in *Travis,* and the particular result there does not control the venue determination here. Indeed, the Court in *Travis* stated that, if the National Labor Relations Act had required union officers to file non-Communist affidavits instead of merely conditioning the Board's jurisdiction upon such filings, "the whole process of filing, including the use of the mails, might logically be construed to constitute the offense" (364 U.S. at 635). This, of course, is not a prosecution under 18 U.S.C. 1001, but even if it were, the situation here would be like the one hypothesized by the Court in *Travis.* The filing of the proxy statement, while required as a condition precedent to the soliciting of proxies, was not required as a condition precedent to



the Securities and Exchange Commission's jurisdiction over the solicitation process.[16]

5. It was the government's contention at trial that the Eastern "commitment" that petitioner allowed to be booked retroactively as a sale by NSMC for the nine-month period ending May 31, 1969, and allowed to be included in the company's unaudited statement of earnings for that period in the proxy statement was an obvious fabrication designed to compensate for the deletion of the large Pontiac commitment. We maintain that position.

The evidence at petitioner's trial established that officials responsible for the financial affairs of NSMC had no knowledge of a large ($820,000) commitment on the part of Eastern Airlines to use the services of NSMC, until the "commitment" letter was first mentioned at the Pandick Press in the early morning hours on August 15, 1969, by other NSMC officials (Tr. 259, 654–655). Yet, the Eastern letter of August 14 purported to confirm an oral commitment given three months earlier. NSMC had never recorded any expenditures on the Eastern "contract" and had never billed Eastern for any services, nor was there any

[16] The decision here does not conflict with *Investors Funding Corp.* v. *Jones*, 495 F. 2d 1000 (C.A.D.C.). In that case, a civil action was brought against the defendant corporations by the Securities and Exchange Commission for injunctive relief to compel the defendants to comply in a timely fashion with certain filing requirements of the Securities Exchange Act. The court of appeals ruled that "venue for civil enforcement actions of the Commission, involving reports required to be filed in the District of Columbia, is here," because "the *locus* for the act of late filing" is in the District of Columbia (495 F. 2d at 1003). That conclusion

(Continued)

documentation to indicate Eastern's interest in NSMC's services other than the suddenly produced "commitment letter" (Tr. 572, 1149–1150). Moreover, the Eastern letter was produced as a substitute for the Pontiac commitment, which petitioner had refused to include in the nine-month statement. Petitioner himself, in a handwritten memo, described the proposed substitution as "really weird" (Govt. Exh. 21).

In closing argument, the prosecutor suggested to the jury that the evidence showed that the "Eastern contract was known to be a complete phony when it came up" suddenly at 3:00 A.M. at the Pandick Press (Tr. 2295). Petitioner does not claim that the remark unfairly characterized the evidence. He contends, however, that subsequent testimony by NSMC's president (Randell), appearing as a government witness in a later trial of Eastern's employee (Mullen),[17] "demonstrates clearly that the prosecutor misstated the facts at petitioner's trial when he made the inflammatory argument to the jury that the Eastern commitment

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follows from the proposition that, in actions for *failure* to make required filings, venue lies in the district where the documents are required to be filed. See *United States* v. *Lombardo*, 241 U.S. 73. "In such a [case] it is difficult to see how the defendant does anything at all except at the place where he fails to file" (*Travis* v. *United States*, *supra*, 364 U.S. at 639 (dissenting opinion of Mr. Justice Harlan)). That rationale has no application to a case in which a false statement is made and filed as part of a continuing offense, begun in one district and completed in another.

[17] Mullen, who signed the Eastern "commitment" letter, was convicted of perjuring himself when he told the grand jury investigating NSMC that he never received anything of value from anyone at NSMC, whereas in fact, shortly after signing the "commitment" letter, he received from Randell several thousand shares of NSMC stock, followed by $25,000 in cash.



was a mythical construct that had first appeared 'by magic [at] 3 o'clock in the morning' and that no responsible NSMC official had previously 'peeped a word' concerning it" (Pet. 42). Petitioner also asserts that these alleged "misstatements were deliberate" (*ibid.*) and that evidence in the prosecutor's possession at the time of trial "directly contradicted * * * the version of key facts the government urged upon the jury" (Pet. 43).

We deny each of these assertions. The excerpts of Randell's testimony quoted by petitioner, even viewed solely on their face, indicate no more than that Randell had been told that an Eastern Airlines employee (Mullen) had agreed in May to go ahead with an NSMC program. There is no suggestion in the quoted testimony that *petitioner* had been aware of Eastern's alleged plans. What Randell may or may not have been told in no way bears on petitioner's state of mind.

Moreover, petitioner omits Randell's further testimony in the Mullen trial that Mullen's plans did not amount to a commitment by Eastern Airlines (Tr. 52–53, *United States* v. *Mullen* (S.D. N.Y., 74 Crim. 172)):

> Q. To your knowledge was there any commitment, oral or written, from Thomas Mullen or Eastern Airlines to spend $820,000 with National Student Marketing Corporation in existence as of May 14, [1969]?
>
> A. Not from Eastern. Tom [Mullen] said he wanted to do the program, but other than he, I knew of no commitment from anybody else, no.

Other evidence in the same trial demonstrates that Mullen had no authority to make any commitment on behalf of his employer, Eastern Airlines (*id.* at 310–324).

In sum, nothing in Randell's subsequent testimony supports petitioner's serious accusation that the prosecutor "withh[eld] from the jury the complete account of the Eastern contract and affirmatively misstat[ed] the actual facts in counsel's argument" (Pet. 45).

In any event, petitioner's contentions concerning the import of Randell's later testimony were not presented in his brief in the court of appeals. Randell's testimony was given on October 14, 1975, when petitioner's rehearing petition was pending in the court of appeals. On October 28, 1975, in a letter addressed to the panel of judges who decided the appeal, petitioner made essentially the same argument that he makes here. The court of appeals thereafter denied rehearing without opinion (Pet. App. D).

Whatever the merit of petitioner's allegations of prosecutorial misconduct, they obviously are not suited for resolution by this Court in the first instance. The proper procedure is for petitioner to present his contentions to the district court in a motion for a new trial under Rule 33, Fed. R. Crim. P., or a motion to vacate his sentence under 28 U.S.C. 2255. A denial of certiorari would not preclude his following either of those paths.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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